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No. 398

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

LAKESIDE TRUCK RENTAL, INC.,
Petitioner,

vs.

LOUIS. J. SCHNEIDER, JR., (SUCCESSOR IN OFFICE TO STANLEY J. BOWERS), TAX COMMISSIONER OF OHIO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BERNARD S. GOLDFARB,
1625 The Illuminating Bldg.,
55 Public Square, Cleveland, Ohio
Attorney for Petitioner

WILLIAM B. SAXBE,
Attorney General.
EDGAR L. LINDLEY,
Assistant Attorney General
State House Annex, Columbus, Ohio,
Attorneys for Respondent.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

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The Petition for Writ of Certiorari filed in this matter does not contain a bona fide statement of grounds for invoking the jurisdiction of this Court nor a bona fide reason for granting of the writ requested.

Petitioner's jurisdictional statement asserts that it has been deprived of a constitutional right in that the Ohio Board of Tax Appeals "... failed to comply with the Opinion of the Supreme Court of Ohio in allowing your petitioners to be heard on the basis of law as established by the Supreme Court of Ohio, *which was nonexistent at a prior hearing before the Board of Tax Appeals* in this cause although it was urged by your petitioners and dis-

avowed by the Board of Tax Appeals, thus presenting an important administrative law question." (Emphasis added.) Petitioner's "Reasons for Granting the Writ" asserts that it (the Ohio Board of Tax Appeals) * * * was duty bound to grant a rehearing by virtue of the *changed condition* of the law." (Emphasis added.)

There has in fact been no establishment of a new, previously nonexistent principle of law nor has there been a change in the condition of the law. The Supreme Court of Ohio did state, in its opinion in *Lakeside Truck Rental, Inc., v. Bowers*, 173 Ohio St., 108:

> "There are no decisions of this court that have considered whether items used in making deliveries to retail customers are used directly in making retail sales. * * *"

However, it does not follow that the decision of the Supreme Court of Ohio in that case constitutes the establishment of a previously unrecognized, new or different principle or condition of the law. The above-quoted statement shows only that the Supreme Court of Ohio had not previously examined that question.

The principle of law which the petitioner now contends to be newly established, namely, that items used in making deliveries to retail customers may be used directly in making retail sales, has existed in Ohio since November 8, 1945, on which date the Ohio Board of Tax Appeals decided this question in *International Harvester Company v. Glander*, Case No. 9943, November 8, 1945, the full text of which is attached hereto as Appendix A.

The jurisdictional statement of the petition admits that the application of this principle of law was urged by the petitioner in the hearing before the Ohio Board of Tax Appeals and states that it was "disavowed" by that board. In view of the demonstrated fact that the principle urged

by the petitioner has been recognized by the Board of Tax Appeals, since November 8, 1945, it becomes obvious, that the action of the Board of Tax Appeals was predicated upon petitioner's failure to present proper evidence to show the applicability of that principle rather than on non existence of that principle.

Petitioner's jurisdictional statement also states, in reference to the second entry of the Ohio Board of Tax Appeals, "* * * petitioners were deprived of their rights to a hearing before a state administrative body by the said body summarily entering its opinion without hearing and *the issue could only be raised for the first time in the Assignments of Error to the Supreme Court of Ohio.*" (Emphasis added.)

Said issue could have been raised prior to the time stated by petitioner in its jurisdictional statement by filing a Motion to Reconsider with the Board of Tax Appeals. The fact that the Board of Tax Appeals has jurisdiction to entertain such motions is apparent from *National Tube Co. v. Myers, Aud., et al.*, 152 Ohio St., 255, 89 N.E. (2d), 129, in which it was held:

> "The Board of Tax Appeals has control over its decisions until the actual institution of an appeal or the expiration of the time for an appeal."

The fact that the Board of Tax Appeals does exercise that jurisdiction and does entertain motions to reconsider is evidenced by its decision in *Hannon Method Waxy Supplies, Inc., v. Stanley J. Bowers, Tax Commissioner*, Case No. 41777, decided December 26, 1961, the full text of which is attached hereto as Appendix B.

CONCLUSION

Respondent respectfully submits that the foregoing demonstrates that the petitioner's stated basis for invoking the jurisdiction of this Court and stated reasons for granting the writ requested are defective. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted.

WILLIAM B. SAXBE,
Attorney General,
EDGAR L. LINDLEY,
Assistant Attorney General
State House Annex, Columbus, Ohio,
Attorneys for Respondent.

APPENDIX A

BEFORE THE BOARD OF TAX APPEALS
DEPARTMENT OF TAXATION OF OHIO

INTERNATIONAL HARVESTER COMPANY,
Appellant,

vs.

C. EMORY GLANDER,
Tax Commissioner,
Appellee.

ENTRY

This cause came on to be heard upon an appeal by International Harvester Company and the Service Delivery Company from the action of the tax commissioner in denying its application for a refund in the sum of $180.15. This cause was submitted upon the transcript of the proceedings before the tax commissioner and the evidence.

The application for refund was made under the provisions of section 5546-8 of the General Code on the ground that prepaid tax receipts in the above amount were erroneously canceled in connection with the sale of five trucks by International Harvester Company to the Servlee Delivery Company, for which the former has not been reimbursed by the latter. The Servlee Delivery Company joined in the appeal due to its interest as the purchaser. It is the claim of the appellant that the purpose of the consumer, the Servlee Delivery Company, was to use the trucks directly in making retail sales. The application for refund was denied by the tax commissioner, because some of the sales of ice were made to commercial establishments such as restaurants,

groceries, meat markets, drug stores, etc. for refrigeration purposes.

Section 5546-1, General Code, reads in part as follows:

> "Retail sale and sales at retail include all sales excepting those in which the purpose of the consumer is * * * to use or consume the thing transferred * * * directly in making retail sales * * *."

The evidence shows that the trucks in question were purchased for the purpose of selling and delivering ice to domestic customers. Due to the war domestic trade increased to such an extent that it was necessary to purchase additional trucks. Bodies were built on the trucks of the same type that were always used for domestic business. The trucks were smaller than those used for commercial purposes. The ice was sold from house to house and was not ordered in advance. The evidence also shows that during the war Federal regulations would not permit two trucks to go over the same territory, so that the trucks in question sold ice to some commercial establishments. The evidence clearly shows that a very small percentage of ice sold from these trucks was sold to commercial establishments and that the principal purpose of the Service Delivery Company in purchasing the trucks was to use them for the domestic trade. To the exient that they were so used they were used directly in making retail sales. Ordinarily sales of ice to commercial establishments to serve their needs and not for purposes of resale would constitute retail sales although such sales may be in larger quantities than sales to homes. In the case of *People v. Monterey Ice & Development Company*, 29 Calif. A. 421, 84 Pac. (2d) 1069, it was held that sales of ice by an ice manufacturer to lettuce packers for

refrigeration were retail sales. In the case of *Gaines et al. v. Montague*, 51 Fed. Supp. 61, the court said:

> "The word 'retail' in ordinary trade means a sale in small quantity or direct to consumers, as distinguished from 'wholesale', meaning a sale in large quantity to one who intends to resell. * * * *"

In *White Motor Company v. Littleton*, 124 Fed. (2d) 92, the court held as follows:

> "The word 'retail' in common ordinary acceptation, when used in sales parlance, means a sale in small quantity or direct to the consumer, as distinguished from the word 'wholesale' meaning a sale in large quantity to one who intends to resell, and the character of the sale is not altered by the use to which the consumer may put the purchased commodity."

In the case of *Wisconsin v. Arkansas Wholesale Grocers Assn.*, 313 Ark. 313, 90 S. W. (2d) 96, the court held that sales of wrapping paper, paper bags and twine to merchants constitute retail sales. The court said:

> "Under the Sales Tax Act (Acts 1935, 283) the quantities of goods sold or the prices at which they are sold are immaterial in determining whether or not a sale is a sale at retail."

These cases cannot be said to be applicable under our Sales Tax Act since sales of ice to stores are used directly in making retail sales of groceries, food, etc. and, therefore, the sales of such ice are not retail sales. However, section 5546-1, General Code, does not say that the purpose of the consumer must be to use or consume the property transferred exclusively in making retail sales, and the Board cannot read the word "exclusively" into the statute. The Board is of the opinion that when the dominant purpose of the consumer, as in this case, is to use the property directly in making retail sales, the sales of such property to the con

sumer are not retail sales within the meaning of the statute and are, therefore, not subject to the tax. Consequently, the Board finds that the appellant is entitled to a refund in the above amount less the vendor's 3% discount, making a net amount to be refunded of $174.75.

It is, therefore, considered and adjudged by the Board that the action of the tax commissioner herein complained of be, and the same is hereby reversed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation, this day taken with respect to the above matter.

KATHERINE A. DALEY
Acting Secretary

APPENDIX B

BEFORE THE BOARD OF TAX APPEALS
DEPARTMENT OF TAXATION
STATE OF OHIO

RANNEY METHOD WATER SUPPLIES, INC.,
Appellant,

vs.

STANLEY J. BOWERS
Tax Commissioner of Ohio,
Appellee.

ENTRY

This cause and matter came on further to be considered by the Board of Tax Appeals following the vacation of an entry journalized by this Board under date of August 17, 1961, wherein a sales tax assessment order theretofore made by the Tax Commissioner against appellant in the basic amount of $7,753.44 was reduced by $1,208.85 and wherein a basic use tax assessment of $4,762.62 was, in all respects, affirmed.

The vacation of the entry dated August 11, 1961, was in response to a "motion to reconsider" filed herein under date of August 23, 1961, by counsel for the appellee. The authority of the Board of Tax Appeals to vacate its decision and to retain the matter on its docket for further consideration is set out in the first branch of the syllabus in the case of *National Tube Co.* v. *Lyon*, 152 Ohio St., Reports at page 255.

This syllabus reads as follows:

"1. The Board of Tax Appeals has control over its decisions until the actual institution of an appeal or the expiration of the time for an appeal."

The matter was resubmitted to the Board of Tax Appeals on the notice of appeal, the statutory transcript supplied by the Tax Commissioner, the testimony and evidence presented at the hearing before the Board of Tax Appeals on December 16, 1959, the original briefs filed by counsel, the motion to reconsider filed by counsel for the appellee and the briefs filed by counsel in support of, and in opposition to, the motion.

Upon a reconsideration thereof the Board of Tax Appeals finds that in its entry dated August 11, 1961, the reduction of appellant's basic sales tax in the amount of $1,208.85 was predicated upon the proposition that Revised Code Section 5739.03 was "remedial" in nature and that the portion of said statute which reads:

> "The failure to have obtained, or to have furnished, a certificate shall not prevent a vendor or consumer from establishing that the sale is not subject to the tax, and in such event the tax shall not apply"

and which above quoted portion was added to the statute effective September 13, 1955, should apply to purchases made by the appellant prior to September 1955.

However, in the motion for reconsideration, counsel for the Tax Commissioner points out that the Tenth District Court of Appeals, in the case of *Hamden Neon Electric Corporation v. Bowers*, Case No. 6296, decided July 29, 1960, held that the provisions of Revised Code Section 5739.03 affected vested rights and was not "remedial" in nature. A copy of the Court of Appeals decision, which was attached to appellant's brief, is herewith made a part of the record in this case.

This decision of the Court of Appeals was not cited by counsel to the Board of Tax Appeals prior to the Board's entry dated August 11, 1961, and the Board of Tax Appeals admits that it overlooked its own September 3, 1959, de-

cision with respect to this legal question as set out in its entry in the Hanover Neon Electric Corporation case.

Giving further consideration to the matter, the Board of Tax Appeals finds that it is bound by the Court of Appeals decision, above noted, and that it should have found as a matter of law, and hereby does find, that Revised Code Section 5739.03 is not "remedial" in nature and that appellant's purchases of items prior to September 1959, which went into the Wheeling Steel Corporation contract were subject to sales tax for the reason that appellant gave no exemption certificates to its suppliers when it purchased said items, as required by the provisions of Revised Code Section 5739.03, as said section read on the dates of said purchases.

The Board of Tax Appeals therefore, readopts its language used in its August 11, 1961, entry with respect to all items except those involved in the Wheeling Steel Corporation contract and, as to these items, the Board finds that their purchase was subject to sales taxation.

Giving effect to this reconsideration, it is the order of the Board of Tax Appeals that the final order of the Tax Commissioner in this matter dated October 9, 1959, be, and the same hereby is, in all respects, affirmed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation this day taken with respect to the above matter.

James E. Hexon,
Secretary